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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 146.

HILL-BEHAN LUMBER COMPANY, a Corporation,
Petitioner,

v.

STATE HIGHWAY COMMISSION OF MISSOURI,
a Corporation,
Respondent.

PETITIONER'S REPLY BRIEF.

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INDEX.

Page

I. Reply to respondent's point that there can be no federal question involved where a state court judgment has denied a landowner compensation for the appropriation by the state of his property for a public use upon the ground that the state is immune from suit 1

II. Reply to respondent's point that there can be no appropriation of petitioner's property in violation of the "due process" clause of Amendment XIV of the Federal Constitution where a state court judgment has ruled that petitioner has no property right 8

III. Reply to respondent's point that there can be no violation of the "equal protection" clause of the Fourteenth Amendment of the Federal Constitution, and hence no federal question is involved, where the discrimination between persons or territories is based upon classifications which are reasonable and have a fair relation to the object of the legislation 12

Cases Cited.

Becker Steel Company of America v. Cummings, 296 U. S. 74, 80 L. Ed. 54..... 13

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107.....5, 12

Campbell v. Arkansas State Highway Commission, 183 Ark. 780, 38 S. W. (2d) 753..... 10

Central Union Tel. Co. v. City of Edwardsville, 269 U. S. 190, 70 L. Ed. 229..... 9

Chicago, Burlington & Quincy Railroad Company v. City of Chicago, 166 U. S. 226, 41 L. Ed. 979.....3, 5, 14

Chick Springs Water Co. v. State Highway Department, 159 S. C. 481, 157 S. E. 843..... 10

City of Chicago v. Taylor, 125 U. S. 161, 31 L. Ed. 638 10
Ettor v. City of Tacoma, 228 U. S. 148, 57 L. Ed. 773.10, 11
Johnson v. City of St. Louis, 172 Fed. 31 (C. C. A. 8th) 10
Hawke v. Smith, 253 U. S. 221, 64 L. Ed. 871..... 14
Hopkins v. Clemson College, 221 U. S. 636, 55 L. Ed. 890 6
Householder v. City of Kansas, 83 Mo. 489.....10, 11
Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 83 L. Ed. 208 14
Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U. S. 613, 79 L. Ed. 1090..... 5
State ex rel. Anderson v. Becker, 326 Mo. 1193, 34 S. W. (2d) 27 14
State v. Roach, 230 Mo. 408, 130 S. W. 689..... 14
Tremayne et al. v. City of St. Louis, 320 Mo. 120, 6 S. W. (2d) 935 10
Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254..... 9
United States v. Jones, 109 U. S. 513, 27 L. Ed. 1015.. 3

Constitutional Provisions Cited.

Amendment XIV, Section 1, of United States Constitution 3, 5, 7, 8, 11, 12, 14
Article II, Section 21, of Missouri Constitution 2, 8, 9, 11, 13, 14, 15

Statute Cited.

R. S. of Mo. 1939, Section 8750..... 2

Text Cited.

20 Corpus Juris, Section 140, pp. 671-674..... 10

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PETITIONER'S REPLY BRIEF.

Petitioner desires to reply briefly to the points urged by respondent in opposition to petitioner's application for a writ of certiorari.

I.

As to Respondent's Point (pp. 5, 8, Respondent's Brief) That There Can Be No Federal Question Involved Where a State Court Judgment Has Denied a Landowner Compensation for the Appropriation by the State of His Property for a Public Use Upon the Ground That the State Is IMMUNE FROM SUIT.

Respondent contends that there can be no federal question before this Court as to whether the State of Missouri has **waived** its **immunity from suit** to recover compensa-

tion for the appropriation of private property for public use by a statute[1] providing that the State Highway Commission may "sue and be sued" or by a constitutional provision[2] stating "that private property shall not be taken or damaged for public use without just compensation." It is said that this is a question of local state law, as to which the decision of the Missouri Supreme Court, in holding that neither the statute nor the constitutional provision above quoted constituted a **waiver** of the State's immunity from such a suit, is controlling (Respondent's Brief pp. 5, 8). In other words, respondent asserts that in such a suit there can be no federal questions involved, such as "due process" of law and "equal protection" of the laws, where relief is denied the landowner upon the ground that the state is **immune from suit.** It is said by respondent that this is so because **immunity from suit** is a matter of local state law, as to which the decision of the Supreme Court of Missouri is conclusive.

Respondent's contention will not bear analysis. The solution of the problem, that is, whether a federal question is involved, is not **limited** (as respondent assumes) to a consideration of whether this Court is bound by the interpretation placed upon the statute and the Missouri Constitution by the Missouri Supreme Court to the effect that neither the statutory nor the constitutional provision referred to constituted a **waiver** of the State's immunity from such a suit. Obviously, the effect of the State court judgment is to deny petitioner all remedy and hence compensation for property which the State has appropriated for a public use. The issue is not **how** the aforementioned constitutional and statutory provisions should be construed, but, rather, as construed and applied by the State court, was petitioner denied "due process" of law in con-

1 R. S. of Mo. 1939, Section 8750.

2 Article II, Section 21, of Missouri Constitution.

travention of Amendment XIV, Section 1, of the Federal Constitution, providing that "nor shall any state deprive any person of life, liberty, or property, without due process of law"? In other words, is a landowner whose property has been appropriated by the State for public use without compensation denied the "due process" of law accorded to him under Amendment XIV, Section 1, of the Federal Constitution, where in a suit against the State to recover compensation a State court judgment denies his claim upon the ground that the State is **immune from suit?** The authorities answer these questions in the affirmative.

Eminent domain is the power of the state or of those to whom the power has been lawfully delegated to appropriate property for public use. United States v. Jones, 109 U. S. 513, l. c. 518, 27 L. Ed. 1015, l. c. 1017 (1883). Just compensation for property appropriated is a limitation on the use of the power. The "due process" clause of Amendment XIV, Section 1, of the Federal Constitution applies to state action (legislative or judicial), so that **states** cannot appropriate private property for public use without just compensation to the owner. Compensation is an element of "due process" of law under Amendment XIV, Section 1, of the Federal Constitution. This Court has held that a judgment of a state court whereby private property is appropriated by the state for public use, without compensation made or secured to the owner, is wanting in the "due process" of law required by the Fourteenth Amendment of the United States Constitution. In **Chicago, Burlington & Quincy Railroad Company v. City of Chicago,** 166 U. S. 226, 228, 41 L. Ed. 979, 982 (1897), this Court said, inter alia:

> "The questions presented on this writ of error relate to the jurisdiction of this court to re-examine the final judgment of the Supreme Court of Illinois, and to certain rulings of the state court which, it is alleged,

were in disregard of that part of the Fourteenth Amendment declaring that no state shall deprive any person of his property without due process of law, or deny the equal protection of the laws to any person within its jurisdiction.

* * * * * * *

"The general contentions of the railroad company are:

"That the judgment of the state court * * * whereby compensation to the extent of $1 only is awarded, deprives it of its property without due process of law, contrary to the prohibitions of the 14th Amendment. * * *

"It must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state 'violates the constitutional inhibition; and he acts in the name and for the state, and is clothed with the state's power; his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.'

* * * * * * *

"It is proper now to inquire whether the due process of law enjoined by the 14th Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under authority of a state.

* * * * * * *

"The conclusion of the court on this question is, that since the adoption of the 14th Amendment compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, no matter

under what form of procedure it is taken, would violate the provisions of the Federal Constitution.

* * * * * * *

"In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

Under Amendment XIV, Section 1, of the Federal Constitution petitioner was and is entitled to compensation for any property belonging to it which the state has appropriated for a public use. The state has no power to destroy this **constitutional** right, whether acting through its Legislature or judiciary. Chicago, Burlington & Quincy Railroad Company v. City of Chicago, 166 U. S. 226, 41 L. Ed. 979 (1897); Panhandle Eastern Pipe Line Company v. State Highway Commission of Kansas, 294 U. S. 613, 79 L. Ed. 1090 (1935). The judgment of the Missouri Supreme Court in the above-entitled cause (148 S. W. [2d] 499) deprives petitioner of **all** remedy for the enforcement of this right. In Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U. S. 673, 74 L. Ed. 1107 (1930), this Court held that a plaintiff is denied the "due process" of law accorded to him under Amendment XIV of the Federal Constitution where a state court judgment deprives him of **all** remedy for the enforcement of a right which the state has no power to destroy. The Court said:

"While it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or

through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

In Hopkins v. Clemson College, 221 U. S. 636, 637, 55 L. Ed. 890 (1911), a landowner had brought a common-law action in a state court to recover compensation for property appropriated for a public use. The state court denied the landowner relief upon the ground that in such an action the state was **immune from suit** without its consent. This Court, in reversing the state court judgment, held that with the **exception** named in the Constitution, to wit, that no state shall deprive any person of life, liberty or property without due process of law, every state has immunity from suit. The Court said:

> "The court (state trial court) held that the defendant was a public agent, which could not be sued without the consent of the state. * * * Holding that the state was an indispensable party, and had not given its consent to be sued, the court dismissed the complaint.
>
> "On appeal * * * the twenty-third assignment of error was as follows:
>
> > "'Because the Fourteenth Amendment to the Constitution of the United States provides: "Nor shall any state deprive any person of life, liberty or property without due process of law." The allegations of the complaint show that plaintiff has been deprived of his property for all practical purposes as agricultural lands as effectually as if there had been a physical taking thereof.' * * *
>
> "The Supreme Court of the state adopted the opinion of the trial judge, and on the ground that the state was a necessary party and had not consented to be sued, dismissed the bill of complaint. 77 S. Car. 12

57 S. E. Rep. 551. Thereupon the plaintiff sued out a writ of error to this court.

* * * * * * *

"That ruling and the assignments of error thereon raise the question as to whether a public corporation can avail itself of the state's immunity from suit, in a proceeding against it for so managing the land of the state as to damage or take private property without due process of law.

"With the exception named in the Constitution, every state has absolute immunity from suit.

* * * * * * *

"An examination of the cases cited, in any respect similar to this, will show that they involve questions of liability in a suit, rather than immunity from suit.

"The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion."

On page eight (8) of respondent's brief, Palmer v. State of Ohio, 96 Ohio St. 513, 118 N. E. 102, 248 U. S. 32, 63 L. Ed. 108 (1918), is cited for the proposition that the decision of a state court that the state had not given its consent to be sued or is not suable is controlling. The case is not in point. An examination of the record in that case will show that it was not a suit (as here) against the state based upon the provisions of Amendment XIV, Section 1, of the Federal Constitution to recover compensation for property appropriated by the state for public use. On the contrary, the Palmer case was a suit against the state for **negligence**, a suit to recover damages resulting to the plaintiff from the negligent acts of the state's agents. The question raised was whether the Ohio Constitution, providing that "suits may be brought against the state," constituted consent on behalf of the state to be sued for negligence. This Court held that the construction placed upon the Ohio Constitution by the Ohio Supreme Court,

rejecting the claim that consent of the state to be sued in such an action had been given by that instrument, was controlling. Here it is not a question of whether the state has given its consent to be sued or has **waived** its immunity from suit. The question is: Did the state ever have any **immunity** to waive? It has heretofore been pointed out that a state has **no immunity** from a suit to recover damages for property appropriated by it for public use without compensation.

II.

As to Respondent's Point (Respondent's Brief pp. 5-6, 9, 15-17) That There Can Be No Appropriation or Taking of Petitioner's Property in Violation of the "Due Process" Clause of Amendment XIV of the Federal Constitution Where a State Court Judgment Has Ruled That Petitioner Has NO PROPERTY Right.

Respondent contends that petitioner has not been deprived of property in violation of the "due process" of law accorded to it under Amendment XIV, Section 1, of the Federal Constitution because petitioner had no "property" to be deprived of. And it is said that this is so for the reason that the state court has decided that Article II, Section 21, of the Missouri Constitution providing "that private property shall not be taken or damaged for public use without just compensation" did not create new property rights, duties and obligations in substantive law in favor of petitioner (an abutting landowner). Respondent asserts that said decision of the Missouri Supreme Court in the instant cause is final and conclusive on this issue (Respondent's Brief pp. 5-6, 9, 15-17).

The rule for which respondent contends, namely, that it is for the state court in cases such as this to define rights in land located within the state, has its limitations. The

Fourteenth Amendment has always required that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions and which are frequently designated as "law of the land." In final analysis it is a question of whether the judgment of the state court amounts to an arbitrary or capricious exercise of power or is it in conflict with those fundamental principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254 (1921). It has been held that, where the basis upon which the state court rests its decision denying the asserted federal right has no substantial support in the record, this Court will review and correct it. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review by this Court. See Postal Telegraph-Cable Company v. City of Newport, 247 U. S. 464, 62 L. Ed. 1215 (1918). The construction of a state statute or provision of a state constitution by the highest court of the state will not be followed by this Court where, as here, it is so "unreasonable in its application to those asserting a federal right as to obstruct it." Central Union Telephone Company v. City of Edwardsville, 269 U. S. 190, l. c. 195, 70 L. Ed. 229, l. c. 232 (1925).

The adjudicated cases in this country, including those decided by the Supreme Court of Missouri, show quite clearly that the state court judgment in the instant cause construing the "or damaged" provision of Article II, Section 21, of the Missouri Constitution as not creating a property right in favor of petitioner, an abutting landowner, is **unreasonable.** It has been uniformly held that a statutory or constitutional provision providing, as here, that private property shall not be taken or "damaged"

for public use without compensation was intended to and did create a property right in favor of the abutting landowner and gives such an owner a right of recovery for consequential damages resulting from a change in grade in an adjacent street or highway.[1] And in City of Chicago v. Taylor, 125 U. S. 161, 168, 31 L. Ed. 638, 641 (1888), this Court said that the use of the word "damaged" in a state constitutional provision, such as we have here, "could have been with no other intention."

There is also no escape from the proposition that, prior to the rendition of the state court judgment sought to be reviewed in the instant cause, the Supreme Court of Missouri had given a like interpretation to the word "damaged," as employed in Article II, Section 21, of the Missouri Constitution, that is, it was intended to and did create a property right in favor of an abutting landowner regardless of whether his land was located within the territorial confines of a municipality or outside thereof, and that consequential damages resulting from a change in grade in an adjacent highway or street was recoverable. See Householder v. The City of Kansas, 83 Mo. 489 (1884); Tremayne et al. v. City of St. Louis, 320 Mo. 120, 6 S. W. (2d) 935, 937 (1928), and Johnson v. City of St. Louis, 173 Fed. 31, 36 (1909; C. C. A. 8th), wherein Justice Sanborn who wrote the opinion of the Court in that case, undertakes to review and analyze the Missouri decisions on the point under discussion.

But it is said by respondent that, even if the Supreme Court of Missouri had ruled prior to its decision in the instant case that the "or damaged" phrase added to the

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1 See Ettor v. City of Tacoma, 228 U. S. 148, 57 L. Ed. 773 (1913); Chick Springs Water Co. v. State Highway Department, 159 S. C. 481, 157 S. E. 843 (1931); Campbell v. Arkansas State Highway Commission, 183 Ark. 780, 38 S. W. (2d) 753 (1931); 20 Corpus Juris, Section 140, pp. 671-674.

Missouri Constitution in 1875 created a property right in favor of an abutting landowner, such as the petitioner, still the state court judgment sought to be reviewed herein would not be in violation of the "due process" clause of the Fourteenth Amendment of the United States Constitution, because petitioner has no property right in such former interpretations of the Missouri law and is, therefore, not entitled to have its right to compensation determined by former Missouri law (Respondent's Brief pp. 5-6, 14-15). This contention is without merit. The record shows that petitioner sustained its damages in the year 1935 (R. 75-76). Prior to the year 1935 the word "damaged," employed in Article II, Section 21, of the Missouri Constitution, had been construed by the Missouri Supreme Court in the Householder case, supra, and later cases as giving an abutting owner the right to recover compensation for damages resulting from a change in grade. The right to compensation in such a case has been held by this Court to be a **vested property right,** which is protected by the "due process" clause of the Fourteenth Amendment to the Federal Constitution from destruction by subsequent **state** action, whether denominated legislative or judicial, or both. In Ettor v. City of Tacoma, 228 U. S. 148, 157, 57 L. Ed. 773, 779 (1912), an action was brought in a state court by an abutting landowner to recover consequential damages for change in grade in an adjacent street. At the time the grading was done compensation for consequential damages due to street grading was required by statute and judicial decision. During the pendency of the suit the statute was amended and as amended the Supreme Court of the State of Washington interpreted the statute as not requiring compensation to an abutting owner for consequential damages resulting from the change in grade of a street. The landowner contended that the state court in so construing the amendatory statute had deprived him of his property without "due process" of law, in violation

of the Fourteenth Amendment of the Federal Constitution. In reversing the state court judgment, this Court said:

> "The court below gave a retrospective effect to the amendatory * * * act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. * * *
>
> "The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated.
>
> * * * * * * *
>
> "The right to compensation was a vested property right. The judgments must be reversed * * *."

Neither the Patterson case nor the Brinkerhoff case, cited on page fourteen (14) of respondent's brief, lends any support to respondent's contention that this petitioner is not entitled to have its right to compensation determined by the Missouri law which existed prior to the decision of the Missouri Supreme Court in the instant cause. In neither of the cited cases did the state court judgment complained of divest the complaining party of a **vested property right.**

III.

As to Respondent's Point (pp. 6, 17-24) That There Can Be No Violation of the "Equal Protection" Clause of the Fourteenth Amendment, and Hence No Federal Question Is Involved, Where the Discrimination Between Persons or Territories Is Based Upon Classifications Which Are Reasonable and Have a Fair and Substantial Relation to the Object of the Legislation.

Respondent contends that in the instant cause there can be no violation of the "equal protection" clause of the Fourteenth Amendment of the United States Constitution, and therefore no federal question is involved, where the

legislative classification rests upon a reasonable basis and has a fair and substantial relation to the object of the legislation; that all doubts are resolved in favor of the legislative classification set up, that is, that persons owning land within a municipality have a right to recover damages resulting from the change in grade of an abutting street, whereas, persons owning land situated outside of the territorial confines of a city have no right to recover damages resulting from the change in grade of an adjacent highway; that the legislative classification set up is founded upon a reasonable basis and has a fair and substantial relation to the object of the legislation (Respondent's Brief pp. 17-23). Respondent's argument is fallacious. There is no legislative classification involved in this case. Respondent mentions no specific statute in which the Missouri Legislature has expressly undertaken to set up a classification of the kind and character suggested here. In Missouri there are, in a few instances (not mentioned by respondent), cases wherein a statute or a city ordinance applying to a **particular** municipality has undertaken to prescribe the procedure to be followed in securing the rights expressly accorded to every landowner under Article II, Section 21, of the Missouri Constitution. No legislative intent can be inferred from such legislation to set up a classification making a distinction between landowners in a city and landowners outside of a city on the right to recover damages in change of grade cases. It would be **contrary** to the plain language of Article II, Section 21, of the Missouri Constitution, which does not discriminate between landowners or territories. Under this article and section of the Missouri Constitution all landowners are given equal treatment regardless of where their land may be situated. The presumption exists that a legislative body does not intend to violate the Constitution, but intends to act within the scope of its lawful powers and to enact valid and effective legislation. Becker

Steel Company of America v. Cummings, Attorney-General, 296 U. S. 74, 80 L. Ed. 54 (1935); State ex rel. Anderson et al. v. Becker, 326 Mo. 1193, 34 S. W. (2d) 27 (1930).

Petitioner is complaining of judicial action, to wit, a state court judgment which makes an arbitrary distinction between landowners in a city and those who own land without the territorial confines of a city on the right to recover damages in change of grade cases (Petitioner's Brief pp. 13-17, 23). Clearly, Article II, Section 21, of the Missouri Constitution makes no such distinction. On the contrary, every landowner is to be treated alike in change of grade cases. The **Constitution** of a state, like that of the nation, is the **supreme law** within the realm and sphere of its authority. Hawke v. Smith, 253 U. S. 221, 226, 64 L. Ed. 871, 875 (1920); State v. Roach, 230 Mo. 408, 433, 130 S. W. 689 (1910). Viewed from the standpoint of legal character, a Constitution in the American sense of the term is the fundamental or basic law to which all others must conform. In the instant cause the state court judgment denies petitioner equal protection under the **supreme law** of the state. The prohibitions of the Fourteenth Amendment of the Federal Constitution, including the clause that "no state shall deny to any person within its jurisdiction the equal protection of the laws," apply to and may be violated by state action of every kind, by any agency or instrumentality, including not only legislative, but also **judicial** action. Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 83 L. Ed. 208 (1938); Chicago, Burlington & Quincy R. R. Co. v. Chicago, 166 U. S. 226, 233, 41 L. Ed. 979 (1897). Petitioner has previously shown in its original brief that the discrimination effected by the state court judgment has no reasonable basis upon which to stand. Respondent has suggested no state of existing facts or legal reason as a basis or justification for the action of the state court in setting up or creating a classification of the

type which we have here, contrary to the provisions of Article II, Section 21, of the Missouri Constitution, requiring that compensation be paid to **every landowner** whose property has been taken or damaged for public use.

It is therefore respectfully submitted this case is one calling for the issuance of a writ of certiorari to review a state court decision.

Respectfully submitted,

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